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Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 573rd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 19 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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* No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 9.45 a.m.

The discussion covered in the summary record began at 10.05 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (A/CN.9/410)

1. **Mr. SEKOLEC** (Secretariat), introducing the report of the Secretary-General on draft Notes on Organizing Arbitral Proceedings (A/CN.9/410), said that arbitration laws and rules typically allowed arbitrators broad discretion in the conduct of proceedings. Unlike court proceedings, which had fairly well-developed procedures and usages, arbitral proceedings differed not only from one arbitral institution to another, but also from one arbitrator to another. As a result, the parties, panel members, advocates and others involved in a given arbitration might have different expectations as to the conduct of the proceedings. If they did not receive timely guidance on how to proceed, there might be misunderstandings and delays, and in extreme cases a party might even feel it had not been given sufficient opportunity to present its case.

2. Those considerations had led the Commission to decide to prepare a text in order to explain to practitioners, in a non-binding fashion, matters concerning the organization of arbitral proceedings. For the first such text, entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1), the Secretariat had sought information and views from all types of practitioners, as well as from national arbitral bodies, groups of experts and the International Council for Commercial Arbitration (ICCA).

3. Three guiding principles had been adopted in preparing the present draft Notes. First, the text should not in any way limit the beneficial flexibility of arbitration. Secondly, it should not establish any requirement beyond the existing rules, laws and practices, and should be limited to reminding practitioners of the procedural topics on which procedural rules might be useful, in the form of a check-list that offered broad hints about possible approaches or types of decisions the arbitral tribunals might wish to adopt. Thirdly, the text should not attempt to harmonize or unify existing arbitral practices.

4. Another consideration which had affected the drafting was the fear that if the Commission suggested solutions, they might, because of UNCITRAL's prestige, be given much more weight than the authors had intended. Accordingly, views on solutions were expressed with some reserve, and the title had been changed from "Guidelines", which was felt to be too strong, to "Notes".

5. **Mr. GRIFFITH** (Australia) said that the text, which took into account points made at the previous session, was now very tight and useful, providing a check-list of matters for possible consideration. Rather than listing all those various matters under the table of contents, however, he wondered whether it would not be more useful to give them in paragraph 11, in the form of a check-list as such.

6. **Mr. BROQVIST** (Observer for Sweden) said that the draft text had been favourably received in his country as being very useful for arbitration practitioners. One possible effect would be to harmonize arbitration practice between different jurisdictions. Although that might be contrary to the authors' intentions, the response to the idea had been very positive in Sweden. The Notes would help less experienced arbitrators to understand what was expected by other parties.

(*Mr. Broqvist, Observer for Sweden*)

7. Questions had been raised about the legal status of the Notes — whether they were to be regarded as binding, or at least as putting pressure on practitioners — and fears had been expressed that they might be used for the purpose of delaying proceedings or as an argument in an action against an award. However, there was no reason for such misgivings. The title, the introduction and the individual notes themselves all made it clear that the text was not binding.

8. The authors seemed to have had in mind primarily proceedings which involved a number of different procedural systems. It might be made clearer that purely national proceedings might be expected to be governed by domestic procedural rules to a greater extent than the Notes suggested.

9. **Mr. FOUCHARD** (France) said that while the draft Notes represented a considerable improvement over the previous version, particularly through the dropping of items that could have caused problems, they could perhaps be shortened further. He welcomed the fact that the title had been changed from "Guidelines" to "Notes" and that there was no longer any great emphasis on the need for preparatory conferences, which had once been the main purpose of the document. The overall structure was much more suited to the objective of assisting practitioners with concrete questions arising in arbitral procedures. The chronological organization was much more appealing.

10. None the less, his delegation still had great reservations about the whole project. It would serve no useful purpose, in so far as for experienced arbitrators it would be quite superfluous, while among inexperienced arbitrators it would cause anxiety and give rise to errors in practice by confronting them with the difficulty of their task at the very start. The check-list would be alarming for most arbitrators, although many of the matters in question would not ever come up, or would do so only later, gradually and in a manner not foreseeable at the outset. The text was above all dangerous, despite its non-binding character, because it was wrong for UNCITRAL to give advice which was not purely legal, but rather concerned practical matters completely unrelated to its mandate. Despite the modesty of the text as it now stood, the prestige enjoyed by UNCITRAL and the success of its earlier work on arbitration were such that it would be impossible to prevent lawyers from treating it, whether in good or bad faith, as a source of arguments for complicating procedures or contesting awards.

11. **Mr. SZURSKI** (Poland) said that, in general, it was important to have a clear idea about the purpose of the Notes and to choose a title that properly reflected the substance of the document. The present text constituted a wide-ranging analysis of practice in the conduct of arbitral proceedings which would be very helpful to practitioners. It could hardly, however, be called "suggestions for consideration", as in paragraph (2) of the document, since it covered such a wide variety of approaches. He wondered whether UNCITRAL should not in fact offer suggestions or views on how, taking into account the wide range of existing practices, arbitrators could solve problems arising in international commercial arbitration and give guidance as to what was or was not compatible with a properly conducted arbitration process. Such views and suggestions would be of great help to inexperienced arbitrators throughout the world, but they would be by no means binding. The title of the document might then be amended to "UNCITRAL views or suggestions".

12. **Mr. GONZALEZ SORIA** (Observer for the Inter-American Commercial Arbitration Commission) emphasized his agreement with the policy underlying the document. It was right to stress that its effect should not be to undermine the flexibility and freedom of arbitrators and arbitration tribunals. He welcomed the emphasis in the first three paragraphs on the non-binding character of the Notes, whose function was to assist arbitrators and provide a description of problems encountered in practice. A more ambitious text might raise problems like those mentioned by the representatives of France and Sweden. So long as the Notes did no more than provide assistance in the form of a check-list, it would be of great technical value. He would be glad to submit the document, with any amendments that might be made, to his organization's Conference, to be held in November 1995, in Asunción, Paraguay, so that it could be disseminated in the Americas.

13. **Mr. HODEL** (Observer for Switzerland) said that his country had been sceptical from the start regarding the idea of adding a preliminary stage to the arbitration proceedings. He questioned the usefulness in principle of such an exercise, which might in many cases prove counterproductive. There was the danger that such a preliminary stage might be given excessive importance and thus influence the main proceedings. It might make the proceedings more cumbersome and costly. Parties and arbitrators might be encouraged to use such preliminary procedures even when they were not appropriate. It should not be forgotten that an extra stage in an arbitration process would benefit a party that wanted to hold up the process. The Notes would probably lead to greater formality in the conduct of proceedings and were unlikely to simplify the tasks of deciding and judging, especially when used by an inexperienced arbitrator.

14. **Mr. CHOUKRI SBAI** (Observer for Morocco) regarded the document as an excellently prepared contribution, which had succeeded in avoiding several thorny problems that had given rise to heated discussion in the past. Its importance lay precisely in its non-binding character, as expressed in paragraphs 2 and 3. It provided a set of guidelines which arbitrators could use if they wanted to, but it would also be useful for the parties concerned because it set out the general principles and objectives of arbitration.

15. **Mr. ABASCAL ZAMORA** (Mexico) said that the Notes provided a legal guide that would be of great use all over the world, but especially in areas where arbitral proceedings were less developed than in Europe. International commercial arbitration was expanding quickly throughout the world, and it was clearly appropriate to help to resolve international commercial disputes and apply uniform international trade law to relations between commercial entities in all countries. Some people, however, saw the Notes as dangerous, fearing that they might establish a minimum standard that would then be used as a reason not to accept arbitration. That danger was met by the non-binding character of the rules, as stated in paragraphs 2 and 3 of the Notes, and even more clearly in paragraph 10. Since the check-list of issues did not set up minimum standards, but simply pinpointed the most important factors with a view to assisting inexperienced arbitrators, it was hard to believe that parties would be able to use it to delay proceedings.

16. **Mr. LEBEDEV** (Russian Federation) said that the document as a whole was an excellent reflection of the functions and objectives of UNCITRAL. It dealt with the practice of commercial arbitration and promoted the application of international instruments, including a number produced by UNCITRAL. He did not view the Notes as a set of rules or recommendations, but as a document intended to draw attention to organizational and technical problems that might arise in international commercial arbitration. It was perfectly logical to concentrate on such procedural issues in arbitration processes. The document prepared by the Secretariat had taken account of comments made at the twenty-seventh session of the Commission as well as at the XIIth International Arbitration Congress (Vienna, November 1994) and elsewhere. It was more sharply focused and concise than the previous version. Such concision was not necessarily an advantage: a more specific and detailed document might have been more useful. He found it difficult to understand the

(*Mr. Lebedev, Russian Federation*)

concerns expressed by certain experts, which were perhaps connected with the fact that some countries already had well-established procedures set out in normative texts. There did not seem to be any real risks in the present text that had not existed in the previous version. Indeed, the present document could help to reduce the costs involved in arbitration. Its main importance, however, was that it directed attention to typical problems that arose in arbitration proceedings and covered a wide range of highly relevant issues. The present text allowed more flexibility than the previous version and was certainly not binding. Jurists and commercial and business circles throughout the world would be able to use it or not as they wished.

17. **Mr. MADRID** (Spain) said that the Secretariat had taken great care to make it clear that the text did not even contain recommendations, but was simply intended to be a useful tool for those having recourse to arbitral proceedings. In his view, there was no risk of a negative impact, as had been suggested by certain speakers, since its only purpose was to help those who might wish to make use of it in all kinds of arbitration proceedings, not just in the field of international commercial arbitration. It contained many references to applicable arbitral rules and even a reference in paragraph 91 to national laws. Whatever the kind of arbitration involved, a guide such as the present text would be of great assistance. It might be a good idea to bring out its purpose more sharply in the opening paragraphs so as to alleviate the fear that it might reduce the flexibility that was so important in arbitration.

18. **Mr. HOLTZMANN** (United States of America) expressed his appreciation of the Secretariat's efforts in producing a much-improved document. Perhaps some changes could be made to allay the fears of the French representative. He would in fact be suggesting the deletion of some provisions that might even by inference appear to constitute recommendations; if the Notes were made recommendations, that might affect the flexibility regarded by many as important. On the Spanish representative's point that the Notes might be useful in national arbitration, he thought it might be presumptuous to indicate that a document focusing on the differences of approach that might occur in international arbitration was also addressed to national arbitrators, although parts might indeed be useful to them. As to the form, he could agree to the suggestion of the Australian representative.

19. **Mr. RENGER** (Germany) said he could accept the Notes as a very helpful document that met its purpose, since it was not binding and merely constituted an aid to arbitrators and parties to arbitration proceedings.

20. **Ms. ZHANG Yuejiao** (China) welcomed the document. The Commission should conduct its discussion on the basis of the non-binding nature of the Notes, the need for flexibility and the principle that using the Notes should not result in increased delay or expense in arbitral proceedings. There was room for some improvement to bring the document into line with those criteria.

21. **Mr. SWIFT** (United Kingdom) endorsed the three guiding principles set out by Mr. Sekolec. The Notes would be particularly helpful in bridging the gap between parties from different legal backgrounds. Practitioners in his country considered that the Notes would be useful, and, far from increasing costs, should, by avoiding uncertainty and delay, reduce them.

22. **Mr. AL-ZEID** (Observer for Kuwait) thanked the Secretariat for its work in preparing the comprehensive document which would be of considerable assistance in arbitration. He believed that it was unnecessary for the Commission to discuss the document in detail and that only general comments need be made.

23. **The CHAIRMAN** called for a discussion on the document section by section. To save time, members should avoid trying to re-write the text.

Paragraphs 1-3

24. **Mr. ABASCAL ZAMORA** (Mexico) considered that the Notes laid too much stress on the powers of the arbitral tribunal. It should be made clear that adoption of the procedures discussed in the Notes did not depend exclusively on the arbitral tribunal but was subject to agreement between the parties to the arbitration. It was important, moreover, to indicate that the parties should not adopt procedural agreements binding the arbitral tribunal in such a way as to deprive it of the flexibility that it needed.

25. **Mr. GRIFFITH** (Australia) suggested that the list of contents on pages 2-4 of the document should be placed after paragraph 11 as a check-list.

26. **The CHAIRMAN** noted that there were no objections to that proposal and requested the Secretariat to make the necessary change.

The meeting was suspended at 11.35 a.m. and resumed at 11.50 a.m.

27. **Mr. HOLTZMANN** (United States of America) suggested that at the end of paragraph 1 it should be made clear that the Notes referred to arbitrations that were administered by an institution as well as those that were not.

28. The description of the Notes in paragraph 2 as "merely suggestions" was unfortunate, since the Commission had been told that they were not recommendations or suggestions. Paragraph 2 should be rewritten in a more affirmative form to indicate that the Notes did not establish any binding legal requirement on parties or arbitrators and that their sole purpose was to remind parties of matters that might be considered at an appropriate stage to facilitate the arbitration process.

29. **Mr. SZURSKI** (Poland) agreed with the comment of the United States representative on paragraph 1.

30. He suggested that the first sentence of paragraph 2 should be reworded as follows: "The Notes have been prepared for consideration. They do not affect the procedural prerogatives of the arbitral tribunal in conducting the arbitration." The second sentence was unnecessary and should be deleted.

31. The first sentence of paragraph 3 should also be deleted and the paragraph should read: "The use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon."

32. **Mr. GONZALEZ SORIA** (Observer for the Inter-American Commercial Arbitration Commission) supported the proposals of the Polish and United States representatives, which would help to emphasize the non-binding character of the Notes.

33. **Mr. CHOUKRI SBAI** (Observer for Morocco) supported the United States proposal on paragraph 1.

34. **Ms. ZHANG Yuejiao** (China) said that her delegation shared the view that the Notes could be of assistance not only to arbitration practitioners, but also to arbitration institutions.

35. **Mr. LEBEDEV** (Russian Federation) said that the second sentence of paragraph 3 should be retained, since it dealt with an important point. Arbitration rules could in fact include regulations on matters not dealt with in the Notes.

36. **Mr. MADRID** (Spain) said that his delegation could go along with the United States proposal. Perhaps the word "international" should also be inserted.

37. **Mr. ABASCAL ZAMORA** (Mexico) felt that the term "administered arbitration" was obscure. He would prefer "institutional arbitration".

38. **Mr. HOLTZMANN** (United States of America) agreed that "administered arbitration" might be ambiguous, but felt that "institutional arbitration" also lacked clarity. A phrase along the lines of "arbitration administered by an institution" might make the function and role clearer. Any necessary redrafting could be left to the Secretariat.

Paragraphs 4 and 5

39. **Mr. SZURSKI** (Poland) said that the last two sentences of paragraph 5 were unnecessary and could be deleted.

40. **Mr. HOLTZMANN** (United States of America) said that, in his view, the words "timely procedural decisions" appearing in the heading should be replaced by a phrase such as "timely decisions on organizing the proceedings", or "timely decisions on the conduct of the case". The term "procedural" where used in the same context elsewhere in the text should be avoided and appropriate drafting changes made. Many "procedural" matters covered by the Notes were regarded in some legal systems as matters of substance.

41. In paragraph 4, the words "the type and complexity of issues of fact and law" could be deleted; they now had little meaning, since the accompanying description contained in an earlier draft no longer appeared in the Notes. Also, the phrase "a cost-efficient resolution" could be expanded to read "a just and cost-efficient resolution".

42. The text should indicate that arbitrators' discretion might be limited by the rules agreed upon by parties as well as by other agreements of the parties and any provisions of applicable procedural law. Perhaps a new paragraph 5 *bis* could be created for that purpose.

43. **Mr. FOUCHARD** (France) said that a simpler alternative wording to "usefulness of timely procedural decisions" in the heading might be "usefulness of organizing the arbitral procedure in a timely fashion". With regard to the discretion of arbitral tribunals, limiting factors included not only the will of the parties and agreements between them, but also the fact that parties were subject to procedural law and had to abide by arbitral procedures regardless of applicable law. It would therefore be better to say that arbitrators' discretion was limited by the parties themselves and by fundamental principles of law.

44. **Mr. HOLTZMANN** (United States of America) said that he could partly go along with the French representative's proposals. It was, however, necessary to retain the reference in the heading and in the text to "timely decisions".

45. **Mr. ADENSAMER** (Austria) agreed with the representative of France that the notion of "decisions" should be avoided. That would make it clear that the text was not designed to encourage appeals or efforts to protract proceedings.

46. **Mr. ABASCAL ZAMORA** (Mexico), referring to the remarks by the representative of France concerning the law of procedure, said that it would be preferable to speak of the law of arbitration, since some lawyers tended to equate the term "procedure" with judicial proceedings.

47. **Mr. HOLTZMANN** (United States of America) suggested, with a view to accommodating the concerns of the Austrian and French representatives, that the heading might read "Discretion in conduct of proceedings and usefulness of timely consideration of the organization of proceedings".

48. **Mr. LEBEDEV** (Russian Federation) said that a suitable alternative to the expression "procedural decisions" might be "procedural orders", which appeared in paragraph 11, since such orders were decisions that the arbitral tribunal had to take. The final drafting could be left to the Secretariat.

49. **Mr. SZURSKI** (Poland) said that paragraphs 4 and 5 dealt essentially with discretion and flexibility in the conduct of arbitral proceedings. Consequently, the heading should simply read: "Discretion in conduct of proceedings".

50. **Mr. CHOUKRI SBAI** (Observer for Morocco) proposed that the title be changed to "Discretion in conduct of procedure and usefulness of timely agreements".

51. **Ms. ZHANG Yuejiao** (China) said that discretion in the conduct of proceedings and timeliness of procedural decisions were both important aspects and should be retained.

52. **The CHAIRMAN** said that the Secretariat would look into the matter of finding an alternative term for "procedural decisions".

Paragraphs 6-8

53. **Mr. HOLTZMANN** (United States of America), referring to paragraph 6, said that it should be emphasized that there were limitations to the independent decision-making capacity of the presiding or sole arbitrator. Perhaps the first five words of the paragraph might therefore be replaced by a phrase along the lines of "While some rules, agreements of parties or determinations by arbitral tribunals provide that various decisions on organizing procedures may be taken".

54. The subject of the advantages and disadvantages of consultations was a sensitive and controversial one, and the text that dealt with it raised questions, but did not and could not provide any answers. He accordingly proposed that the first sentence of paragraph 6 be retained and the rest deleted.

(Mr. Holtzmann, United States of America)

55. In paragraph 7, the phrase "at the place of arbitration or at some other appropriate place" should be deleted, since it might conflict with rules or even laws that required different organizational arrangements. Also, a phrase such as "or by other methods or combinations of methods or by meetings" should be included at the end of the paragraph. That would broaden the scope of the consultations in a manner that was in fact intended and had been provided for in previous drafts.

56. **Mr. HERRMANN** (Secretary of the Commission) said that the Secretariat's task of implementing the changes requested by delegations would be difficult unless they were accompanied by clearly and fully worded proposals. Such an approach would also assist delegations in adopting positions on proposals made by other delegations. It was therefore necessary for the Commission to decide upon the procedure to be adopted for presenting proposals to the Secretariat.

The meeting rose at 12.35 p.m.